COURT OF APPEALS NO. 48452-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

V.

SCOTT EVATT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jack Niven and Kitty-Ann van Doorninck, Judges

OPENING BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The court violated appellant's right to due process when it convicted him of crimes without observing procedures adequate to protect his right not to be tried, convicted or sentenced while incompetent.

2. The court violated appellant's right to due process when it allowed him to represent himself without observing procedures to ensure his waiver of counsel was knowing, voluntary and intelligent.

3. The trial court erred by imposing a sentence that exceeds the statutory maximum for the crime of conviction.

Issues Pertaining to Assignments of Error

Appellant was initially evaluated and found competent. The court granted appellant's request to proceed pro se. Thereafter, appellant filed pleadings indicating he had been kidnapped by police in 2006 and the police stitched tracking devices into his eye sockets. Appellant filed motions for transport to the hospital to have these foreign objects removed.

The prosecutor thereafter spoke with the psychologist who performed appellant's evaluation and provided appellant's pro se pleadings. The psychologist felt it was appropriate to reevaluate

appellant and the prosecutor informed the court of this new development. The court itself expressed concern for appellant's competency.

However, the case was transferred to a different judge and appellant was never reevaluated. Appellant was convicted at a bench trial in which he represented himself after waiving the right to a jury trial. At sentencing, appellant appeared retrained, in a suicide smock and eye patch. He had tried to remove his left eyeball.

1. In failing to order revaluation, did the court violate appellant's right not to be tried, convicted and sentenced while incompetent?

2. In allowing appellant to represent himself without ordering a new evaluation, did the court fail to ensure appellant's waiver of the right to counsel was knowing, voluntary and intelligent?

3. Where the combined period of incarceration and community custody exceeds the statutory maximum, should this Court remand for resentencing?

B. STATEMENT OF THE CASE[1]

Following a bench trial at which appellant Scott Evatt represented himself, Evatt was convicted of assaulting a police officer and illegally using drug paraphernalia. CP 54-61; RP 616. He was acquitted of obstruction. CP 54-61; RP 616.

1. Competency Concerns

At a hearing on July 14, 2015, before the Honorable judge Jack Nevin, Evatt moved to represent himself. 1RP 3. Evatt explained he wanted counsel, but not from the Department of Assigned Counsel (DAC). He asserted he had a conflict of interest with the agency. 1RP 3. Dave Shaw of DAC was present at the hearing as a "courtesy" but did not believe he had been officially assigned.[2] 1RP 3. As the court was advising Evatt of his rights, Shaw interrupted, stating: "Judge, excuse me, I think we need a 1077, he's had several." 1RP 7. Evatt responded he had already been to Western State Hospital ten times and Shaw's request was simply a delay tactic. 1RP 8. The court recollected that Evatt had appeared before the court in 2014 and was convinced at that time (as well) that he could not trust DAC. The court recollected that

[1] This brief refers to the transcripts as follows: 1RP – pretrial hearings 7/14/15, 8/5/15, 8/7/15, 8/12/15 and 10/28/15; RP – jury trial December 2015; and 2RP – sentencing on 12/6/15.

Evatt's distrust extended to another attorney that was not with DAC, so Evatt opted to represent himself. The court further recollected that Evatt was found competent by Western State. 1RP 9.

Nonetheless, the court noted Evatt's mental illness did manifest itself during the trial:

> During that prior trial, Mr. Evatt had been found competent by Western State. However, my recollection, and I will stand to be corrected by that, the substance of that file, which contains the report I'm referring to, my recollection is that Mr. Evatt suffers from mental illness. He was found competent in the sense that he could help counsel. But as I recall, it was a very detailed and invasive report as those reports go because Mr. Evatt suffers from some mental illness.
>
> I further recall that during the course of the trial, and, obviously, I make these references as a lay person, but it was my perception by his demeanor in trial, which I should say, in fairness to Mr. Evatt, by and large was appropriate, but that what might have been the symptoms of that metal illness did manifest themselves during the course of that trial.

1RP 10. The court therefore ordered an evaluation. 1RP 11; CP 5-9.

Psychologist Mark Duris evaluated Evatt on July 17, 2015. CP 11. In Duris's opinion, Evatt's form of thinking was goal directed but that he had some symptoms of delusional thinking as he told Duris, "they did a movie about me called RETRO." CP 12.

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[2] The Notice of Appearance indicated Shaw had been assigned July 8. CP 103.

Evatt also exhibited paranoia about the police based on his allegation several officers in 2006 kidnapped and tortured him. According to Duris, "[h]is recall for this alleged incident appeared vague, saying that he lost memory for a period and attributes this loss of time to the police who conspired with the help of his brother." CP 12.

Evatt told Duris he had represented himself in the past and would do so again if he could not have counsel appointed from outside Pierce County. He later indicated an independent attorney from inside the county would be acceptable. CP 14. Duris found Evatt's decision to represent himself to be a volitional choice on his part and not the product of delusional thinking. CP 14. Duris found Evatt also understood what was expected of him in the courtroom:

> Lastly, he demonstrated a clear understanding of what was expected of him in terms of courtroom etiquette and/or behavior as when he was asked what he would do if someone were telling lies about him in court, he stated he would keep silent but then agreed that it would be good to also talk quietly to his attorney and tell him of his objections rather than speak out in court without permission. Should Mr. Evatt not be represented by a court appointed attorney, he was found to be competent to represent himself in a pro se capacity.

CP 14.

Duris concluded: "it appears that in his present mental state, he does possess the basic and fundamental capacity to understand the nature of the charges against him and he does possess the basic and fundamental capacity to rationally participate in his own defense with our without counsel." CP 14. Based on Duris' report, Judge Nevin found Evatt competent to stand trial. CP 16-17.

A hearing was held on Evatt's motion to proceed pro se. Evatt explained that unless he was appointed an attorney from outside the county, he wanted to represent himself. 1RP 21. He explained he had initiated an evidentiary hearing involving DAC attorneys he alleged were working with the prosecution, but the court found no misconduct. 1RP 18. On a prior case, he was assigned Bailey Miller, who "was an attorney outside of DAC supposedly" but Evatt claimed Miller was DAC in Yakima. 1RP 18. In Evatt's opinion, the conflict attorneys were as untrustworthy as DAC attorneys because they are friends with DAC attorneys. 1RP 19. The explained it could appoint a private practitioner that has a contract with DAC to represent people. 1RP 22. Evatt responded he was better off remaining pro se. 1RP 23. Judge Nevin found Evatt knowingly, voluntarily and intelligently waived his right to counsel. 1RP 23.

The state expressed concern about Evatt's waiver as she observed, "his comments seem to be obviously very entrenched in is perceptions in terms of any alleged prior litigation regarding Department of Assigned Counsel." 1RP 26. To the prosecutor, Evatt did not appear to understand the nature of conflict attorney list. 1RP 26. The court indicated it, too, was concerned about Evatt representing himself, but the concern centered on Evatt's mental illness:

> I don't like the current state of the law in the State of Washington as it relates to the seemingly unfettered ability to represent themselves. But with due respect to Mr. Evatt, and due respect to you, sir, Mr. Evatt tried a case in my court, totally appropriate, wrote briefs, oral argument, it is okay, I believe he is ill. And if ever there was a case where I have had consternation about whether something is knowing, intelligent, and voluntary, and where I have been tempted to go against what seems to be an overwhelming title wave from the appellate courts, it is in his case. I'm still open to being persuaded to the contrary.

1RP 28. The court indicated it would reconsider its ruling if the state noted a motion. 1RP 28.

With further prompting by the court, Evatt agreed to accept Shaw as standby counsel. 1RP 29.

At the end of the hearing, Evatt filed a motion for transport to the hospital for blood tests and a "skull X-ray." CP 20. He alleged the following reasons for why he needed transport to the hospital:

> COMES NOW: I, Scott Evatt, am 4.5 pro-se, and respectfully asking the court, to order a transport, to a hospital, as I am in need of blood tests, and a skull X-ray, for foreign objects, that officers had stitched into my eye sockets. Apparently, so officers could track me, since 2006, where I was abducted, by officers, during my homelessness, in 2006.
>
> I was injected, with a needle, by medical looking staff, strapped to a gurney, and handcuffed, but officers did not mention, any ambulance in the police report, on 7-06-15. I had abscesses all over my body, because of that needle injection, and the jail doctor, ignores my repeated medical kites, for over a month. My booking number is 2015187036. 187, is a cop code for death or killed. Jail booking officers, threaten me, with kidnapping, as I heard them say, that I had been tracked, by something stitched into my eye sockets, and how officers, took me, in 2006, when I was homeless. I could be dying, as I need medical tests.

CP 20 (emphasis in original).

On August 7, 2015, the state moved the court to reconsider its ruling allowing Evatt to proceed pro se. As the prosecutor argued, Evatt's mental health issues essentially prevented him from conducting his trial defense unless he was represented. 1RP 39 (citing In re Rhome, 172 Wn.2d 654, 260 P.3d 874 (2011) (court may consider defendant's mental illness when ruling on motion to

proceed pro se). The prosecutor pointed to Evatt's recent filings as evidence. 1RP 40. The prosecutor also handed forward a handwritten pleading filed by Evatt in another case outlining his mental health history and numerous admissions to Western State Hospital, some of which were voluntary. 1RP 41.

While the court expressed skepticism about Duris' competency conclusion, the court noted Duris had found Evatt competent to represent himself. 1RP 45. The prosecutor suggested Duris was merely repeating what Evatt told him when he put in his report that "he was found to be competent to represent himself in a pro se capacity." 1RP 45. The court disagreed but reiterated its skepticism about Duris' report:

> This is entirely about the welfare of a human being, who, like every other citizen enjoys the protection of the constitution. I think Mr. Evatt is mentally ill. I'm not a professional, and the professionals tell me he is competent to represent in a pro se capacity. Which, incorporating this notion of common sense, which Ms. Lund [the prosecutor] makes reference to, is with due respect to Dr. Duris, it is profoundly difficult to fathom at any level.

1RP 48. The court took the matter under advisement. 1RP 48-49.

Regarding Evatt's pro se motions, the court ruled Evatt had to bring the motion to withdraw before the judge who took his guilty plea. 1RP 52. The court denied Evatt's transport request as well.

1RP 52. Before adjourning, the prosecutor indicated she would seek clarification with Duris about his report. 1RP 55.

At the next hearing on August 12, 2015, the prosecutor indicated she had since spoken with Duris and Duris wished to reevaluate Evatt, based on Evatt's pro se pleadings in the case:

> Given the specific issue I presented to him, I did provide him copies of some of the filings in this case, which caused him to wish to reevaluate his position as well as mentioning to him that this court has presided over a prior trial. As a result of that, a reevaluation on this issue seems prudent. The doctor seems to be of that opinion, I'm of that opinion. I will need to coordinate that with Western State and obtain an order from the court.

1RP 61. No order for reevaluation was ever presented, however, and Evatt was never reevaluated. 2RP 17. Judge Niven reassigned the case to the Honorable Kitty-Ann van Doorninck. CP 104; RP 3-4.

At the pretrial hearing before van Doorninck, Evatt brought up his request for transport to the hospital to have the foreign objects removed from his eyes,[3] but van Doorninck ruled the motion had nothing to do with the charges and denied it. RP 15, 39. The judge granted Evatt's request to fire standby counsel and accepted

[3] Evatt said there was also something in his tooth. RP 18.

Evatt's jury trial waiver. RP 22, 54. The bench trial before Judge van Doorninck proceeded the next week.

2. Trial Testimony

Tacoma police sergeant Jon Verone was on patrol on the evening of July 6, 2015, when he was dispatched to the 4000 block of East J. Street in Tacoma. RP 93. Someone called in to report a suspicious person looking in cars in the area. RP 93. When Verone arrived, he saw Evatt, who matched the detailed description that had been given. RP 93-94. Evatt's left hand was underneath a jacket draped over his shoulders, and he was walking toward the alley nearby. RP 95-96.

Verone got out of his patrol car and directed Evatt to stop. RP 95. Verone was about 15-20 feet from Evatt at the time. RP 96. Reportedly, Evatt slowly continued toward the alley. RP 96. Verone claimed Evatt had a look on his face as if he were contemplating flight. RP 96. According to Verone, Evatt was making "furtive movements" with his hand. RP 96. Verone was preparing to draw his gun when officers Zachary Spangler and Dean Waubanascum arrived in another patrol car. RP 96, 163.

Spangler and Waubanascum approached and Waubanascum directed Evatt to stop. RP 168, 336. According to

Spangler, Evatt's left hand was underneath his draped jacked and Spangler could not see what was in his right, but it was balled into a fist. RP 168. Although Spangler described Evatt as "non-threatening," Waubanascum pulled his weapon. RP 247, 336. Evatt eventually complied and dropped to his knees. RP 168. Spangler testified a pipe dropped to the ground to the right of Evatt. RP 168, 192. The officers took him into custody based on the pipe. RP 195.

Once Spangler and Waubanascum restrained Evatt in handcuffs, Verone left to talk to the reporting party. RP 99. Before leaving, Verone noticed Evatt's eyes were glazed over and his reactions were indicative of someone who was under the influence. RP 99.

Spangler and Waubanascum brought Evatt to the patrol car and Spangler advised him of his rights. RP 183. Spangler testified Evatt indicated he understood and would talk to the officers. RP 175. According to Spangler, Evatt admitted he smoked methamphetamine earlier and had used the pipe to do so. RP 179. Spangler testified that at some point, Evatt had something in his mouth but swallowed it instead of giving it to Spangler. RP 179.

Spangler testified Evatt's eyes were glassy and he was sweating. RP 176.

Spangler testified that when he told Evatt to get in the police car, Evatt stiffened his body and braced his back against the car, making it impossible for Spangler to push him in. RP 197. Spangler ran around to the driver's side rear door and started pulling Evatt into the vehicle. RP 198. He nearly succeeded but Evatt was able to stand back up. RP 198.

Spangler ran back to the passenger side and tried to assist Waubanascum. RP 199. Spangler forgot to shut the rear driver's side door, however. RP 199. Although Spangler could not describe specifically how Evatt managed, but he somehow got in the car and positioned himself so that he was on his back with his legs facing toward the driver's side door and started scooting toward the open door. RP 199, 348. Spangler testified Evatt kicked him when he returned to the driver's side:

> I ran back around, hoping I could close the door in time, and when I got around to that side he threw his foot up, hit me in the stomach, caused me to buckle over and stumble backward.

RP 199.

Spangler testified Evatt jumped out of the car, but Spangler grabbed him and "swept his legs" so that Evatt fell to the ground. RP 199, 203. In falling, Evatt struck his face on the inside of the patrol car and was injured.[4] RP 204, 315. Waubanascum helped Spangler hold Evatt down until Verone returned. RP 204. At some point during the scuffle, the officers had managed to radio that they needed assistance. RP 206-207.

Verone heard the officers' radio call and returned to the scene. RP 103. He had been gone for approximately five minutes. RP 105. Spangler and Waubanascum were on top of Evatt. RP 105-06. Verone assisted holding Evatt down so Waubanscum could retrieve leg restraints. RP 106. Once the restraints were put on, the officers put Evatt in the patrol car. RP 106.

Spangler called for aid since he used force against Evatt and Evatt hit his face. RP 209. While waiting for aid, Evatt said he had swallowed a baggy of meth. RP 210. An ambulance took Evatt to Tacoma General Hospital before he was booked into jail. RP 181.

Evatt called jail physician Miguel Balderrama to testify about his injuries. RP 398. Evatt was finally able to get an appointment

[4] In contrast to Spangler, Waubanascum testified that he and Spangler pulled Evatt out of the car, Waubanascum grabbed his left leg and Evatt went down on his chest. RP 350.

with Balderrama in August. During the appointment, Balderrama viewed Evatt's booking photo. RP 414. Balderrama testified he "most likely" said in response: "Boy, the cops don't like you, do they?" RP 414.

Balderrama testified Evatt complained of facial pain around the right side of his eye, in the orbital area, and was concerned something was in the eye. RP 400. On August 26, Balderrama had an X-ray taken of Evatt's orbital area. RP 414. He testified it showed no fractures or foreign objects. RP 400.

During a break in Balderrama's testimony, Evatt indicated the X-ray Balderrama testified about was now missing. RP 403. Evatt asked if he could subpoena the office manager who said it would be available for trial, but was not. RP 403. The court responded it wasn't relevant to what happened July 6th. Evatt reiterated its importance due to his alleged kidnapping in 2006:

> THE DEFENDANT: But they do [matter] because the officer – I was taken by – in 2006, and these items that are – that was in my tooth and are in my eye cavities are there. And now this one is gone and the x-ray is gone and now the eye cavity, there's something stitched in my eye cavity. I know it's there. And if I have to pop my eyeball out to prove it to the Court, I will. I will go with one eye before I go out there any more and deal with these cops tracking me. I know it sounds crazy, but I'm telling you. I know it for a fact, I'll stake my life on it, that there's something

> stitched in my eye cavity. I will do it. I don't care. I'm not going to end up going through court and go back out there and the officers do this to me again, you know.

RP 403-04.

Testimony of Balderrama resumed and Evatt asked about a dental X-ray. Balderrama testified it showed decay and that Evatt's tooth was drilled and a temporary filling was done. RP 406. Evatt disagreed there was anything wrong with his tooth beforehand and maintained the x-ray would have proven it:

> THE DEFENDANT: Yes, but I was going to have the doctor show the diagonal angle of the x-ray, of what was that object that was in there. That's what I was trying to say. I was expecting the x-ray to be there because that shouldn't have been in my tooth and it wasn't decay because it was a square object.

RP 407. The court responded Evatt could testify about his tooth later. RP 407.

Evatt denied assaulting either officer. RP 421, 426. Evatt testified that he immediately obeyed the officers' commands, dropped to his knees and dropped the pipe. RP 420-21. When the officers brought him to their police car, they took his Qwest card and said something about giving it to someone else and making

him disappear.[5] RP 421. Waubanascum then wrestled Evatt to the ground and the officers ground his face into the ground. RP 421, 423. Waubanascum wrongly reported, "He's resisting, he resisting." RP 425.

Evatt testified that what Spangler and Waubanascum described was not physically possible:

> Just that as soon as the sergeant left, these officers stated that stuff to me and then they ended up beating me up. And then they made up this report saying it took five minutes to place me in the cop car and jump around, flip around and kick him, whatever like that. Like I'm some kind of a ninja in that small space in the cop car. There's just no room to move. You could barely move in that top [sic] car.

RP 426.

While waiting for the ambulance, Evatt heard the officers talking about his eye:

> The window was open a little bit and they said something about that was stitched into my eye, something about tracking or something like that. I couldn't hear all of that completely.

RP 428.

[5] When Evatt asked Waubanascum about this, Waubanascum testified he had no idea what Evatt was talking about. RP 494. Evatt was adamant that the officers threatened him, which caused him to fear getting in the police car. RP 497.

Evatt testified Waubanascum rode with him in the ambulance and said he was going to "crush" Evatt's face.[6] RP 429. The ambulance attendee said to Evatt, "We'll give you a glucose shot."[7] RP 429. He then injected something into Evatt's lower back. RP 429. Evatt claimed that once they arrived at the hospital, Waubanascum made threats to carve his face and cut off circulation to his testicles.[8] RP 430.

When he was brought to jail and booked, the officers told Evatt they could have killed him. RP 432. Evatt also believed the officers paraded another arrestee by him who looked "deathly ill" to make it look like "I was injected with a deadly disease by medical staff." RP 561, 603.

According to Evatt, they also said "something was put in my tooth or something like that." RP 432. Evatt testified it related to what happened in 2006:

> So I ended up going to dental and I saw the X-ray and I was like, oh, man. This is all new stuff that – I'm you know, I'm hearing that I was taken in 2006 and, you know, something about my brother who hates my guts was involved. And this is by certain people that are in the cell across from me that are, like talking to you, like, the guard or something, here and there and they are whispering a couple of things.

[6] Waubanascum denied threatening Evatt in the ambulance. RP 560.
[7] In closing, Evatt said the shot gave him abscesses on his lower back. RP 603.
[8] Waubanascum denied making these threats. RP 563.

> And I'm just getting this information on my own and I'm like, how's this, you know? I don't have any of this information and now this missing X-ray that showed proof on my tooth and now they are not bringing it to court when this technician said it will be there for court.

RP 433.

The court interjected at this point and reminded Evatt it was only interested in what happened July 6. RP 433. Evatt concluded his direct testimony by saying Spangler and Waubanascum were trying to scare him because they knew he was taken in 2006. RP 433-34.

In closing, Evatt reiterated that Spangler and Waubanascum knew about 2006 and that Evatt's brother was in on it:

> But, you know, that – I don't' – when they started saying other stuff that the officers already did this to me, this happened later, when I was already handcuffed in the car I heard them say that in 2006 I was taken and they did this, you know, and how I had something stitched into my eye that they – I wasn't supposed to hear this. Something was tracking me. I didn't hear that part either. I just heard "tracking."
>
> So, I mean, in the jail also there was inmates that were talking, cops were saying something to them, right not far from my cell and they were saying stuff that he cops told them to say. And that's where I'm getting my information from.
>
> So I don't have a phone. I don't have the information to get this stuff that they did to me. I was – I was told that my brother was in on it. I know for a fact my brother did come to jail and do this to me with the cops. He has come to jail and he acted like it was

> me in the jail cell yelling and they tape recorded me like it was me in that cell. My brother is truly angry at me. He – that's exactly – I keep going to fail because of him, also. The officers are working with him, also.

RP 601.

In convicting Evatt of the charged assault, the court found the officers did not threaten to make Evatt disappear, but that his perception of the threat is what caused Evatt to resist getting in the patrol car and ultimately kick Spangler:

> And then your testimony was that they made some threatening comments to you. That they threatened to take your Qwest card, that they were going to make you disappear. I find that not to be credible. I don't believe that's based in reality. The officers denied saying anything like that. There isn't any reason for them to say anything like that.
>
> But what it does is explains your behavior about why you did not want to get into the patrol vehicle. And that their testimony was very credible, in terms of you bracing yourself up against the car and refusing to get into the patrol vehicle. Because at that point, and you've testified to that, that you were afraid, that they scared you.
>
> THE DEFENDANT: And forced me.
>
> THE COURT: That initially you wanted to go back to jail because you were homeless and you didn't like being homeless.
>
> THE DEFENDANT: Yes.
>
> THE COURT: But then, because they made these statements that, again, I don't believe was based in reality, was something else talking, whether

> that's methamphetamine or something else, I don't know. But you became afraid and you started resisting their efforts to get you into the car.
>
> I think it all happened very, very quickly once there was that resistance.
>
> . . .
>
> . . . Again, that happened fast and it's pretty unclear. But at some point, you're trying to get to the other side of the car. And your testimony is you were afraid. That's consistent with behavior of somebody who's afraid. In that process, I don't have any doubt that you kicked Officer Spangler.

RP 614-16.

The court found Evatt was not in his "right mind that day." RP 618. As the court told Evatt, "I don't think your perceptions were accurate." RP 618.

3. Sentencing

At sentencing, the prosecutor made the following record regarding Evatt's circumstances:

> I'm going to indicate for the record the current physical situation for Mr. Evatt. Mr. Evatt is currently in the courtroom in a restraint chair, in a suicide smock, also wearing an eye bandage over his left eye.
>
> It's our understanding, based on information from the jail, that last night he indicated that he had an injury to his left eye. The officers had him evaluated and later learned, I believe through the benefit of him having had a chance to see Dr. Balderrama in the clinic, that the defendant reported that he had tried to pull his eyeball out.
>
> He was apparently transported to Tacoma General Hospital for further treatment and I believe

> released with a recommendation for medical treatment, in terms of ointment and that sort of thing. I'm not aware, at least of this juncture, of any injury that was actually sustained to the eye.
>
> He was also recommended to be placed on a suicide watch, hence the suicide smock today.
>
> It's my understanding that the defendant became very agitated and was very, again, very concerned about the fact apparently there was – he has some concerns about his eye and what may or may not have been placed in it.

2RP 4-5.

Evatt confirmed he tried to pull his eye out because the court did not believe him about the tracking devices. 2RP 6-7. He said he tried to pull his eye out before but his fingers were too fat. 2RP 7. He tried using a spoon but had to give it back after lunch. 2RP 8.

The court indicated it had reviewed several of Evatt's past cases where he was evaluated at Western State Hospital and found competent. 2RP 10. The court noted Evatt seemed "perfectly articulate and clear about what we're doing here today and what's been going on, in terms of the trial." 2RP 10. The court concluded Evatt was competent to proceed, although it found he needed mental health treatment. 2RP 12-13.

After a short recess, the jail guard put it on the record that Evatt had tried to dig his eye out twice (RP 14-15) and that medical staff was concerned about his competency:

> SERGEANT WASSON: Like I said, I did talk to my mental health folks, our medical folks. I can't get a lot of information on the medical stuff. He's not on any type of narcotics that will present him from understanding what is going on, just Tylenol right now. They are concerned about his competency though, the mental health folks are. But they have not interviewed him yet.

2RP 15.

The court maintained its finding Evatt was competent to proceed. RP 17. The court noted he was evaluated twice in 2015 for another case and once for this case and found competent. The court indicated the reports "every time, indicated that he was not psychotic[,] although "there's clearly some features of that that they believe is methamphetamine induced at the time when he first entered the jail." RP 17. In the court's opinion, Evatt was tracking. RP 18. A mental health professional was later consulted and she indicated she did not have concerns for Evatt's competency. RP 25.

The prosecutor recommended the bottom of the range (51 months), although she pointed out Evatt's mental illness might

justify a downward departure. 1RP 34. The state recommended zero time on the misdemeanor. 1RP 37. Evatt asked for an exceptional sentence below the standard range, but the court imposed 51 months (CP 77) because it was "worried" for Evatt and found he needed "the structure of the Department of Corrections." 2RP 44. It also imposed 12 months of community custody. CP 78. The court imposed no time on the misdemeanor. CP 86-92. This appeal follows. CP 98.

C. ARGUMENT

1. EVATT WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS WHEN THE COURT FAILED TO ORDER REEVALUATION OF HIS COMPETENCY TO STAND TRIAL AND TO REPRESENT HIMSELF ONCE THE EXAMINING PSYCHOLIGIST INDICATED HE WANTED TO REEVALUATE EVATT AFTER READING EVATT'S PRO SE PLEADINGS THAT WERE FILED AFTER THE PSYCHOLOGIST'S INITIAL EVALUATION.

The prosecutor, court and standby counsel each doubted Evatt's competency, but the court relied on the report of Dr. Duris to find Evatt competent – not only to stand trial – but to represent himself. Once the court learned, however, that Dr. Duris wished to reevaluate Evatt, in light of his pro se pleadings and fixation on foreign objects stitched into his eye sockets by police in 2006, it was incumbent on the court to order reevaluation of Evatt's

competency to stand trial and to represent himself. Instead, the court transferred the case and did nothing to protect Evatt's right not to be convicted or sentenced while incompetent. This was an abuse of discretion.

(i) Violation of Right Not to Be Convicted and Sentenced while Incompetent

Conviction of an accused while he is legally incompetent violates her constitutional right to a fair trial under the Fourteenth Amendment's due process clause. State v. Wicklund, 96 Wn.2d 798, 638 P.2d 1241 (1982); Pate v. Robinson, 383 U.S. 375, 377, 15 L. Ed. 815, 86 S. Ct. 836 (1966). Washington law sets forth standards to guard against the violation of this constitutional right, providing: No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues. RCW 10.77.050.

Where there is reason to doubt a defendant's competency, the trial court has a duty to appoint experts and order a formal competency hearing. RCW 10.77.060. The statute directs:

> Whenever . . . there is reason to doubt [a defendant's] competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved

> by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

RCW 10.77.060(1) (emphasis added).

Incompetency exists where a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect. RCW 10.77.010(15). Trial courts look at a variety of factors when determining whether there is reason to doubt a defendant's competency, including "the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). Once there is reason to doubt the competency of the accused, a court is required to comply with RCW 10.77.060, and its failure to order an investigation is a denial of due process. State v. Marshall, 144 Wn.2d 266, 27 P.3d 197 (2001), abrogated on other grounds, State v. Sisouvanh, 175 Wn.2d 607, 290 P.3d 942 (2012).

In Sisouvanh, the Supreme Court held that the trial court's determination of the adequacy of a competency evaluation is reviewed for an abuse of discretion. Sisouvanh, 175 Wn.2d at 620. In so holding, the court relied on its prior cases holding that other

sorts of competency determinations are reviewed for an abuse of discretion. See e.g. State v. Lord, 117 Wn.2d 829, 901 822 P.2d 177 (1991) (whether to order a statutory competency hearing); State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967) (determination of competency). The Sisouvanh clarified its prior decision in Marshall, where the court suggested in dicta that a determination of competency is a mixed question of law and fact. Sisouvanh clarified:

> In State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001), we mistakenly asserted, in dicta, that competency is "a mixed question of law and fact" for which "we independently apply the law to the facts." Id. at 281, 27 P.3d 192. To be clear, the law in Washington remains that competency determinations are reviewed for abuse of discretion.

Sisouvanh, 175 Wn.2d at 622 n.3.

Yet, the Sisouvanh court maintained that if there is reason to doubt a defendant's competency to stand trial, RCW 10.77.060 requires the court to order an evaluation. Thus, it appears it is still a denial of due process not to order a competency evaluation if there is reason to doubt the defendant's competency. However, where there is reason to doubt the defendant's competency is reviewed for an abuse of discretion.

Here, there was abundant reason to doubt Evatt's competency. He was fixated on his alleged kidnapping in 2006 and believed the police stitched foreign objects into his eye sockets that had allowed the police to track him. He believed he had been injected with something in the ambulance that gave him abscesses and there was a foreign object in his tooth. The court itself believed Evatt was mentally ill and that his conduct did not conform to Dr. Duris' report and opinion on competency. At the time of Duris' evaluation, Evatt's description of the 2006 kidnapping was vague and brief. At the time of the evaluation, Dr. Duris did not have the benefit of reviewing the pro se pleadings Evatt filed following his evaluation. And once Duris did, he wished to reevaluate Evatt. The prosecutor concurred reevaluation was appropriate. Standby counsel clearly did not believe Evatt was competent. In light of these circumstances, it was manifestly unreasonable not to order the reevaluation. State v. Blackwell, 120 Wn.2d 120 Wn.2d 822, 830, 845 P.2d 1017 (1993) (a court abuses its discretion when it adopts a view that no reasonable person would take and is thus "manifestly unreasonable").

The circumstances of Marshall are instructive. Against the advice of his attorneys, Marshall pled guilty to aggravated first

degree murder for the shooting death of a store owner during a robbery. Marshall later sought to withdraw the plea, however, claiming he was not mentally competent at the time he entered it to have knowingly, intelligently, and voluntarily waived his right to trial. Without convening a statutory competency hearing, the court heard three experts in support of the defense motion, all of whom testified Marshall was not competent at the time of the plea, due to substantial brain abnormalities, all of which affected his ability to think, reason and control himself. Marshall, 144 Wn.2d at 269-72.

In response, the state called one expert, Dr. Trowbridge, who interviewed Marshall for two hours on the day of his guilty plea and found Marshall competent. Marshall, 144 Wn.2d at 269, 272. Trowbridge admitted his determination was made without knowledge of key information, including Marshall's medical history. Marshall, at 272-273.

The trial court denied Marshall's motion to withdraw despite finding "[I]t is clear that [Marshall] has impairment. It is clear that there is brain atrophy." Marshall, at 273 (citation to record omitted). The court also based its decision on its interaction with Marshall at the plea hearing saying,

> I recognize that I'm not a mental health professional, and I recognize that I am drawing conclusions based upon Marshall's demeanor, the manner of his responses, and some of the other things that were going on in the courtroom at that time, but I think I'm entitled to do that and I think that I am probably just as competent as anyone to draw such conclusions.

Marshall, at 273 (citation to record omitted).

In reversing the trial court, the Supreme Court emphasized that the procedures of RCW 10.77.060(1)(a) are mandatory: "where there is reason to doubt a defendant's competency the trial court must appoint experts and order a formal competency hearing[.] Marshall, at 278. In Marshall's case, the experts presented ample evidence calling his competency into doubt. Marshall, at 279. But more importantly here, the Supreme Court found fault with the trial court's determination of competency, while incongruously recognizing Marshall's serious brain dysfunction.

> The court itself accepted Marshall had serious brain damage. During the hearing on motion to withdraw the guilty plea the court said, "It is clear that he has impairment. It is clear that there is brain atrophy. But it is not clear that this has anything to do with whether or not his plea was competent or not competent." Heavily discounting the testimony of Marshall's neurologist, psychiatrist, and neuropsychologist, and choosing to rely instead on its own observations and on the observations of those who interacted with him at the time of the plea itself, the court found Marshall competent to change his

> plea to guilty without the benefit of a statutory competency hearing. This was error.

Marshall, 144 Wn.2d at 280.

Many of the circumstances in Marshall are present here. Most importantly, the court itself doubted Evatt's competency. Judge Nevin indicated time and time again he believed Evitt was mentally ill. Nevin noted Evatt's mental illness manifested itself at his last trial. And while the court in Marshall relied on its own observations to find competency, the court here relied on Dr. Duris' outdated report. Significantly, the court in Sisouvanh specifically noted: "The expert's examination and report may be of relatively little importance to the trial court in making its competency determination in a given case, regardless of whether the examination and report are accepted as adequate for purposes of satisfying RCW 10.77.060." Sisouvanh, at 622-23. Thus, the court here seemed to misunderstand the nature of his discretion in believing it was forced to accept the expert's outdated report despite what it characterized as common sense. In any event, it was manifestly unreasonable for the court not to order reevaluation in light of the prosecutor's request, Dr. Duris' wishes and the

concerns of everyone involved about Evatt's competency. This failure resulted in a denial of due process.

(ii) Failure to Ensure Knowing and Intelligent Waiver of the Right to Counsel

In Faretta v. California, 411 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the United States Supreme Court affirmed a defendant's constitutional right to represent himself at trial, implied under the federal Sixth and Fouteenth Amendments. In Faretta, three was no question as to the defendant's competency. See Id. at 835.

The outer bounds of the right to represent oneself was explored in Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). There, the court considered whether a state may insist that a defendant who is found mentally competent to stand trial must nevertheless proceed to trial with counsel, rather than be allowed to represent himself. Id. at 167, 128 S.Ct. 2379.

The Edwards Court held that it is constitutionally permissible for a state to deny a defendant pro se status "on the ground that [he] lacks the mental capacity to conduct his trial defense" even though he was found competent to stand trial. Id. at 174, 128 S.Ct. 2379. The Edwards Court observed that the standard to determine

whether a defendant is competent to stand trial assumes he will assist in his defense, not conduct his defense, and therefore competency to stand trial does not automatically equate to a right to self-representation. Id. at 174–75, 128 S.Ct. 2379.

In addition, while the dignity and autonomy of an individual underscore the right to self-representation, in the Edwards court's view:

> [A] right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.

Id. at 176, 128 S.Ct. 2379 (citation omitted) (quoting McKaskle v. Wiggins, 465 U.S. 168, 176–77, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)).

Long Before Faretta, our state supreme court considered a right to self-representation under our state constitution. State v. Kolocotronis, 73 Wash.2d 92, 97, 436 P.2d 774 (1968); Const. art. I, sec. 22. There, the defendant had a lengthy history of admission to psychiatric hospitals, and his competency to stand trial was evaluated. Id. at 94, 436 P.2d 774.

Upon being found competent to stand trial, the defendant made a request to represent himself with standby counsel on hand. Id. at 95, 436 P.2d 774. While the court allowed him to participate in some aspects of trial, the court also permitted standby counsel to call and question witnesses, to present an insanity defense over the defendant's objection, and to make a closing argument. Id. at 95–96, 436 P.2d 774. The jury found the defendant not guilty by reason of insanity, but determined he was not safe to be at large in the community. Id. at 96, 436 P.2d 774.

The defendant appealed, claiming he had been denied his right to self-representation. Acknowledging that our state constitution grants a defendant the explicit right to appear pro se, the Kolocotronis court cautioned that the right of an accused "to act as his own counsel may not properly be construed as an absolute right in all cases." Id. at 98, 436 P.2d 774. Instead:

> if the court determines that [the defendant] does not have the requisite mental competency to intelligently waive the services of counsel nor adequate mental competency to act as his own counsel, then his right to a fair trial and his constitutional right to due process of law, is disregarded if the court permits him to so act in a criminal case.

Id. at 99, 436 P.2d 774.2.

Kolocotronis thus allows a trial court to limit the right to self-representation when there is a question about a defendant's competency to waive counsel or to act as his own counsel, even if the defendant has been found competent to stand trial. This reflects concern for a defendant's right to a fair trial and due process of law. In re Rhome, 172 Wash. 2d 654, 661–62, 260 P.3d 874, 879 (2011).

In State v. Hahn, the court noted:

> The standards for waiver of both an insanity plea and the right to counsel are (1) competency to stand trial and (2) a knowing and intelligent waiver with "eyes open", which includes an awareness of the dangers and disadvantages of the decision. [State v.] Jones, [99 Wash.2d 735,] 741, [664 P.2d 1216 (1983)] (citing Faretta v. California, [422 U.S. 806, 95 S.Ct. 2525]). In each case, the trial court must make a factual determination on the record.

Rhome, 172 Wash.2d at 663, 260 P.3d 874, 880 (2011) (quoting State v. Hahn, 106 Wn.2d 885, 895, 726 P.2d 25 (1986).

The Hahn court further noted:

> Whether there has been an intelligent waiver of counsel is an ad hoc determination which depends upon the particular facts and circumstances of the case, including the background, experience and conduct of the accused.

Hahn, at 900, 726 P.2d 25. "This determination is within the discretion of the trial court." Id.

In finding Evatt's waiver of the right to counsel intelligent, the court (Judge Niven) abused his discretion. The court noted Evatt's mental illness manifested itself at the prior trial before the court in which Evatt represented himself. The court stated: "And if ever there was a case where I have had consternation about whether something is knowing, intelligent and voluntary, and where I have been tempted to go against what seems to be an overwhelming title [sic] wave from the appellate courts, it is in his case." 1RP 28. On the prosecutor's motion to reconsider its ruling allowing Evatt to go pro se, the court expressed skepticism about Dr. Duris' report:

> I think Mr. Evatt is mentally ill. I'm not a professional, and the professionals tell me he is competent to represent in a pro se capacity. Which, incorporating this notion of common sense, which Ms. Lund makes reference to, is with due respect to Dr. Duris, it is profoundly difficult to fathom at any level.

1RP 61.

The court subsequently learned that even Dr. Duris had skepticism about Evatt's competency, based on his recent pro se filings about the foreign objects in his eye sockets. The evaluation of a defendant's mental health status is integral to a knowing and intelligent waiver. See Rhome, 172 Wn.2d at 665. Under these circumstances, by failing to order the reevaluation to determine

Evatt's competency to represent himself, the court failed to ensure Evatt made the decision to go pro se with "eyes open." The court's inaction was manifestly unreasonable. The court's inaction resulted in a denial of due process.

2. THE COURT ERRED IN FAILING TO ENSURE THE SENTENCE DOES NOT EXCEED THE FIVE-YEAR STATUTORY MAXIMUM.

Evatt's third degree assault conviction constitutes a Class C felony, with a maximum sentence term of five years. RCW 9A.36.031(1)(g), (2). The sentencing court's notation that the "combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum" (CP 78) would have been sufficient to impose a sentence that does not exceed the statutory maximum for the offense, prior to 2009. See State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011) (under prior statutes, the Department of Corrections was allowed to recalculate community custody terms to ensure the combination of confinement and community custody did not exceed the statutory maximum), accord, In re Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). But the legislature amended the pertinent statute in 2009,[9]

[9] The controlling statute provides,

and in 2012 the Supreme Court made it clear that sentencing courts, not the Department of Corrections, must reduce the community custody term to ensure the combination does not exceed the statutory maximum. Boyd, 174 Wn.2d at 473 (citing RCW 9.94A.701(9)). The proper remedy is to remand to the trial court to specify sentence terms that do not exceed the statutory maximum. Boyd, 174 Wn.2d at 473; State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782, review denied, 177 Wn.2d 1016 (2013).

3. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Evatt qualified for counsel below but represented himself. RP 608. He had just been released from jail and was homeless at the time of his arrest for this case. RP 420. At one time, he was receiving SSI, but it was discontinued while he was in jail. RP 593.

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9) (emphasis added) (effective July 26, 2009. Laws of 2009, ch. 375, § 5). For defendants who were sentenced after this statute became effective, the trial court is required to reduce the term of community custody to ensure that the total sentence is within the statutory maximum, and not the Department of Corrections. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

The trial court found him indigent for purposes of this appeal. CP 99-100. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, the court waived all fines and fees, even the mandatory ones, due to mental illness. CP 75; 2RP 45.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in "compelling circumstances." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case

during the course of appellate review when the issue is raised in an appellant's brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94. Based on Evatt's indigence and mental illness, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

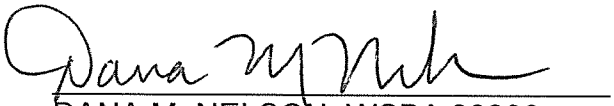
D. CONCLUSION

The court's failure to order reevaluation to determine Evatt's competency to stand trial and to represent himself deprived his of due process and his right to a fair trial. This Court should reverse his convictions. Alternatively, this Court should remand for resentencing. This Court also should exercise its discretion and deny any request for costs, should Evatt not prevail in his appeal.

Dated this 1ST day of August, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH



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